# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 20, 2015 |
| v | No. 322197<br>Wayne Circuit Court |
| KEITH ERIC THOMPSON,<br><br>Defendant-Appellant. | LC No. 13-011241-FC |

Before: BORRELLO, P.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felonious assault, MCL 750.82. The jury acquitted defendant of assault with intent to commit murder, MCL 750.83, and assault with intent to do great bodily harm less than murder, MCL 750.84(1)(a). Defendant was sentenced to 8 to 48 months' imprisonment. For the reasons set forth in this opinion, we affirm.

## I. FACTS

This case arises from an altercation between defendant and Kevin Jones at defendant's home in Detroit. Jones and his mother shared a room in defendant's house. On November 27, 2013, Jones and defendant became involved in an argument. The two began to push one another then started punching each other. Each man accused the other of initiating the physical altercation. At some point, Jones hit defendant with a metal lamp and defendant grabbed two knives from the kitchen. According to Jones, defendant threatened to kill him throughout the incident and intentionally stabbed him in the chest and arm. Defendant testified that Jones grabbed him and made him lose his balance, which resulted in defendant falling on top of Jones and accidentally stabbing him.

Evidence showed that there were potentially five 9-1-1 calls to the police during the confrontation. Detroit Police Officer Johanna Todd and her partner, Officer Brian Gibbings, were dispatched to the scene. As soon as they arrived at defendant's home, Jones ran out the front door. He was holding his hand up to his chest exclaiming, "Help me, I've been stabbed!" Almost immediately, Jones' mother and defendant followed him out of the house. Jones pointed at defendant and exclaimed, "I was stabbed by Keith Thompson!"

Officer Todd attended to Jones, noting that he had a "very deep" wound in his chest and another on his left bicep. Officer Gibbings handcuffed defendant and placed him in the back of

the police car. Officer Todd explained that she then conducted a "protective sweep" of defendant's house to ensure that no one else was injured inside. Once inside, she saw a knife "with what appeared to be blood on it" lying in the kitchen sink. She also saw the living room in disarray and a lamp lying on the floor. Forensic Technician Sara Schulz and her partner, Raymond Diaz, investigated and photographed the scene, recovering the knife from the kitchen and another knife from under the living-room couch in the process. Although some photographs depicting the knives and testimony regarding the knives were introduced at trial, the actual knives were not introduced into evidence.

On March 7, 2014, defendant filed a motion to suppress all of the evidence that Officers Todd and Gibbings found when they searched his house. The trial court conducted a *Walker* hearing on defendant's motion on March 28, 2014. After hearing testimony from Jones, Officer Gibbings, and Officer Todd, the trial court held that "by a preponderance of the evidence . . . there were exigent circumstances that required and mandated the quick, swift action by the police[.]" The court denied defendant's motion. Defendant was then tried, convicted, and sentenced as set forth above and this appeal ensued.

## II. ANALYSIS

On appeal, defendant contends that the trial court erred in denying his motion to suppress evidence of the knives that police observed during the warrantless entry into his home.

Whether evidence should have been suppressed under the Fourth Amendment involves a constitutional issue that we review de novo. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). We review for clear error a trial court's factual findings on a motion to suppress. *People v Farrow*, 461 Mich 202, 208-209; 600 NW2d 634 (1999). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Gingrich*, 307 Mich App 656, 661; 862 NW2d 432 (2014) (citation and quotation marks omitted). We review preserved issues of constitutional error "to determine whether they are harmless beyond a reasonable doubt." *People v Henry (After Remand)*, 305 Mich App 127, 128; 854 NW2d 114 (2014) (citation and quotation marks omitted). A constitutional error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005) (citation and quotation marks omitted).

Both the United States and Michigan Constitutions protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *Gingrich*, 307 Mich App at 666. A warrantless search is unreasonable unless circumstances establishing an exception to the warrant requirement exist. *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000). "Generally, if evidence is seized in violation of the constitutional prohibition against unreasonable searches and seizures, it must be excluded from trial." *People v Barbarich*, 291 Mich App 468, 473; 807 NW2d 56 (2011).

In this case, even if we were to assume without deciding that evidence of the knife should have been suppressed, defendant is not entitled to relief because it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Shepherd*, 472 Mich at 347. Here, when police arrived at the home, Jones ran out the front door with stab

wounds and exclaimed that defendant stabbed him. Police officers observed the wounds and testified to the nature and extent of the wounds and to Jones' unequivocal statement that defendant stabbed him. Moreover, defendant admitted that he went after Jones with knives, but claimed that he was acting in self-defense and that the actual stabbing was accidental. The jury rejected that defense. Thus, irrespective of what police discovered inside the home, there was overwhelming evidence that Jones was stabbed with a knife and that defendant was the person who stabbed him. Defendant's guilt turned on whether the jury accepted his theory that he accidentally stabbed Jones during a defensive struggle. Given the testimony, evidence of the knives was not critical to defendant's guilt or innocence. Indeed, the knives were not produced at trial and there was very little substantive testimony regarding the photographs of the weapons at the crime scene. Consequently, it is clear beyond a reasonable doubt that the jury would have found defendant guilty if the trial court had suppressed the evidence of the officers' discovery of the knives. *Id*.

Defendant next contends that the trial court's repeated questioning of him during trial biased the jury and deprived him of a fair trial.

We review unpreserved claims of judicial bias for plain error affecting substantial rights. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). To show plain error, a defendant must establish that "1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error affects substantial rights if it affected the outcome of the trial. *Id*.

A trial court may question witnesses to "clarify testimony or to elicit additional relevant information." *People v McDonald*, 303 Mich App 424, 437; 844 NW2d 168 (2013) (citation and quotation marks omitted). "But the trial court's examination of witnesses may not pierce the veil of judicial impartiality because a defendant in a criminal trial has a right to a neutral and detached judge." *Id*. (quotation marks and citations omitted). "The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *People v Conley*, 270 Mich App 301, 308; 715 NW2d 377 (2006) (citation and quotation marks omitted). "A defendant claiming judicial bias must overcome a heavy presumption of judicial impartiality." *Jackson*, 292 Mich App at 598 (citation and quotation marks omitted).

The trial court had several lengthy exchanges with several of the witnesses including defendant. For example, the court questioned defendant as follows about the sequence of events before the fight:

> *The Court*: Now, he [Jones] said this before he pushed you?
>
> *Defendant*: Yes. Soon I came in and sit down he started saying, yeah – he acting like he's a preacher 'cause he start preaching to me. He's talking about uh-huh, uh-huh, you cashed my check, didn't you, uh-huh, uh-huh, you didn't give me my money, did you? Uh-huh, uh-huh. I'm going to tell the police you assaulted your wife two days ago, that's why she ain't here, uh-huh. He was saying like that.

*The Court*: So despite him saying all those things you still went and sat down?

*Defendant*: No, I was sitting down when he was saying it. He was standing up over me.

*The Court*: Okay.

*Defendant*: His mother was standing in front of me on his side of the table.

*The Court*: Okay. So they were both standing in front of you?

*Defendant*: Yes, they were.

*The Court*: Then what happened?

*Defendant*: Then when I stood up – as I called the police I stood up.

*The Court*: So wait a minute, hold on for a minute. They're both standing in front of you but you were still able to call the police?

*Defendant*: Right, yes. The phone right here, I got my phone right here, I got my cell phone right here.

*The Court*: Where? When you say right here, what do you—

*Defendant*: It was on the table, just the table right here.

*The Court*: Now, you were able to grab your cell phone[?]

*Defendant*: Yeah, I was able to pick up my phone off the table.

The court engaged in similar colloquies concerning the positioning of the men during the fight, defendant's arrangement with Jones for housekeeping services, the method of payment for those services, and Jones' performance under the agreement.

While the trial court's questioning challenged many of defendant's assertions they were not "of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *Conley*, 270 Mich App at 308. Although the questioning was unusually extensive, the court questioned several other witnesses and the questions were aimed at clarifying testimony or eliciting additional relevant information. See *McDonald*, 303 Mich App at 437. This was particularly necessary because defendant's testimony, including his sudden statement that he had two knives instead of one, his account of Jones grabbing his wrist and pulling himself off the floor, and his contention that he used butter knives against Jones, was often confusing or somewhat incredible. Further clarification was also required because defendant's testimony directly contradicted Jones, most notably regarding when Jones hit defendant with the lamp and the manner in which defendant eventually stabbed him.

Furthermore, the court's jury instructions preserved the appearance of judicial impartiality. The court instructed the jury before testimony, stating: "I may ask some of the witnesses questions myself. These questions are not meant to reflect my opinion of the evidence. If I ask questions, my only reason would be to ask about things that may not have been fully explored." After closing arguments, the judge again instructed the jury that her comments, rulings, questions, and instructions were not evidence and that ". . . when I make a comment or give an instruction, I'm not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you decide this case, you must pay no attention to that opinion." These instructions were sufficient to preserve the appearance of impartiality and defendant has otherwise failed to show that the court's questioning amounted to plain error affecting his substantial rights.[1] See e.g. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.")

Finally, defendant contends that the Detroit Police Department acted in bad faith and violated his due process rights by instituting inadequate evidentiary procedures, which resulted in the loss of the knives. Defendant argues that if the knives had been properly preserved, the jurors could have concluded that they were not used in the assault.

We review unpreserved constitutional issues for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763–764.

"A criminal defendant can demonstrate that the state violated his or her due process rights under the Fourteenth Amendment if the state, in bad faith, failed to preserve material evidence that might have exonerated the defendant." *People v Heft*, 299 Mich App 69, 79; 829 NW2d 266 (2012). If, however, "the defendant cannot show bad faith or that the evidence was potentially exculpatory, the state's failure to preserve evidence does not deny the defendant due process." *Id*. The defendant "bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

In this case, defendant's argument fails because he cannot show how the knives were potentially exculpatory. *Heft*, 299 Mich App at 79. As noted above, in addition to Jones' testimony that defendant stabbed him with a knife, and police testimony that they observed Jones run from defendant's home exclaiming that defendant stabbed him, defendant himself admitted at trial that he stabbed Jones with a knife, although he claimed it was an accident. Given this testimony, the fact that defendant stabbed Jones with a knife was not in dispute. Thus, defendant cannot show how jurors could have somehow concluded that he did not stab Jones if they had been able to examine the knives for themselves. Moreover, defendant does not articulate how the police acted in bad faith with respect to their handling of the knives. Accordingly, defendant cannot show that the failure to preserve the knives deprived him of due process. See *Heft*, 299 Mich App at 79; *Johnson*, 197 Mich App at 365. For the same reason, defendant cannot show

[1] Given our resolution of this issue, defendant cannot show that counsel was ineffective for failing to object to the court's questioning. See *People v Chelmicki*, 305 Mich App 58, 69; 850 NW2d 612 (2014) (counsel is not ineffective for failing to raise a meritless objection).

that counsel was ineffective for failing to file a pretrial motion to dismiss based on the failure to preserve the evidence. See *People v Chelmicki*, 305 Mich App 58, 69; 850 NW2d 612 (2014) (counsel is not ineffective for failing to raise a meritless objection).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Donald S. Owens